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# (Mis)recognition of Customary Marriages: A Comparative Analysis of Canadian and South African Family Law

Corbin W. Golding

# (MIS)RECOGNITION OF CUSTOMARY MARRIAGES: A COMPARATIVE ANALYSIS OF CANADIAN AND SOUTH AFRICAN FAMILY LAW

**Corbin William Golding**[*] [**]

*This paper explores the methods of recognizing customary marriages conducted between Indigenous participants within Canada and South Africa, respectively. It primarily focuses on the functional and philosophical consequences of these methods on the validity of the customary marriages. This paper begins by establishing the problem of misrecognition, which is an injustice that devalues and dehumanizes marital relationships that differ from the European norm. It then turns to an analysis of the forms of recognition in both Canada and South Africa. The former is examined through an investigation of historical case law and more recent constitutional issues, while the latter analysis focuses on statutory requirements and their interpretation by the courts. Each of the sections are followed by a substantive and functional critique of each country's system. The final section introduces a theoretical proposal for recognizing customary marriages in Canada*

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[*] B.A. (Briercrest College), M.Th. (University of Edinburgh), M.Phil. (University of Bristol), J.D. (University of Saskatchewan, gold medal).

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*in a way that would best achieve justice for their Indigenous participants.*

## I. INTRODUCTION

For at least eight thousand years, the island of Yalis—now known as Alert Bay off the northern shore of Vancouver Island[1]—has been inhabited by the Kwakwaka'wakw people, a sea-faring culture that was traditionally comprised of twenty-eight different patrilineal communities.[2] Historically, the Kwakwaka'wakw society was divided into hierarchical kinship groups called "*numayms*," each of which traced its genealogy back to a founding animal ancestor-spirit which had taken human form, and gave spiritual gifts and social rank to their descendants.[3] Such beliefs gave family and kinship a central place within the Kwakwaka'wakw culture since nobility, ceremonial privileges, and social position could all be gained or transferred through marriage and inheritance.[4] More importantly, stability within the family structure was of cosmological importance: an improper or invalid marriage could sever the connection to the ancestor-spirit and not only leave the individual family

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1 See Village of Alert Bay, "About Alert Bay" (last visited 10 July 2022), online: *Village of Alert Bay* <www.alertbay.ca/about-alert-bay>.

2 See Gloria Cranmer Webster, "Kwakwaka'wakw (Kwakiutl)" (last modified 3 August 2018), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/kwakiutl>.

3 Joseph Masco, "'It is Strict Law That Bids Us Dance': Cosmologies, Colonialism, Death, and Ritual Authority in the Kwakwak'wakw Potlach, 1849 to 1922" (1995) 37:1 Comp Stud in Society & History 41 at 47.

4 *Ibid* at 46–48.

without its protection, but expose the entire society to "the destructive forces in the universe."[5]

Such destructive forces were nearly unleashed a century ago, when Tom Williams was tried for the murder of Ernest Jack at Alert Bay on Cormorant Island.[6] Jack's remains were discovered by police in 1921 and, following an investigation, Williams was arrested and committed for trial.[7] The prosecution sought to call a woman named Jennie Williams as a witness, but the admissibility of Jennie's evidence was objected to by the defense on the grounds that Tom and Jennie had been married according to their Kwakwaka'wakw custom.[8] A *voir dire* was held to determine the admissibility of her testimony since, if she were indeed his wife, she would not be a compellable witness.[9] Whether the Williamses had married one another in adherence to their own customs was uncontroversial. What Justice Gregory had to decide was whether Jennie

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5 *Ibid* at 47; and see the discussion on kinships generally in *ibid* at 47–49.

6 *Rex v Tom Williams*, 37 CCC 126, 1921 CanLII 623 (BCSC) [*Williams* cited to CCC].

7 *Ibid* at 127.

8 *Ibid*. The actual cultural group of the Williamses is never mentioned in the case. Their membership in the Kwakwaka'wakw culture is speculative, but is the most likely case given that this is the dominant culture on both Alert Bay and Kingcome Inlet, where they were married. See Donald J Auger, *The Northern Ojibwe and Their Family Law* (Doctor of Jurisprudence Thesis, Osgoode Hall Law School, York University, 2001) [unpublished] at 20. See also Dzawada'enuxw First Nation, "Dzawada'enuxw of Kingcome Inlet" (last visited 10 July 2022), online: *Kingcome* <www.kingcome.ca/people>.

9 See e.g. *Canada Evidence Act*, RSC 1985, c C-5, s 4(3).

could properly be considered Tom's spouse under Canadian law, since they had not been married "according to Provincial laws."[10] After hearing evidence from the local Indian agent concerning Indigenous customs, and also from one Mrs. Cook, "an Indian…who was born and raised at Alert Bay," Gregory J. decided, without providing his reasons, that Jennie's testimony was not admissible.[11]

*R v Williams* is one of the small number of cases in Canadian jurisprudence where marriages conducted according to Indigenous law were tacitly acknowledged to decide a distinct issue. In each case, the court held the awesome power to unilaterally nullify the rights and obligations that spouses owe to one another and to their communities—not to mention to their spiritual and cosmological order—simply because the marriage was not in a form recognized by the state. Tom and Jennie were among the lucky ones, primarily because relationships such as theirs had been begrudgingly accepted by their regional Department of Indian Affairs.[12] Others have been less fortunate, and have been told by the court that their relationships, whatever status they may have held within their own cultures, were not marriages under Canadian law, resulting in intestacy, illegitimacy, or charges of contempt.[13]

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10 *Williams*, *supra* note 6 at 127.

11 *Ibid* at 128.

12 *Ibid*.

13 See e.g. *Ex Parte Cote* (1971), 22 DLR (3d) 353, 1971 CanLII 782 (SKCA) [*Ex Parte Cote* cited to CanLII]; *Manychief v Poffenroth*, [1995] 2 CNLR 67, 1994 CanLII 9130 (ABQB) [*Manychief* cited to CanLII].

Bradford W. Morse correctly points out that "[o]ne of the most immediately striking factors in the response of the Canadian judiciary to the traditional family law of the native people of Canada is its general refusal to define it as 'law' in the first place."[14] At best, such marriages are recognized as creating a valid legal relationship, but are branded with the label "customary," implying that they are grounded within tradition rather than law and that they are "somehow less important and less durable" than civil marriages.[15] At worst, they are ignored or even criminalized.[16] In all cases, Canadian Indigenous-law marriages are recognized only so far as they are able to adhere to the European standard, and are only thought to grant the rights, privileges, and obligations that civil marriages allow. In short, "customary marriages" are recognized as being functionally, substantively, and axiologically equivalent to civil marriages, while anything which does not fit within this mould is tossed aside as being superfluous or even socially dangerous.

Yet Canada is not alone in its strange misrecognition of such relationships. While other settler states have taken a similar, *ad hoc* stance toward their

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14 Bradford W Morse, "Indian and Inuit Family law and the Canadian Legal System" (1980) 8:2 Am Indian L Rev 199 at 219 [Morse, "Indian and Inuit Family Law"].

15 *Ibid*. This essay will primarily use the term "Indigenous-law marriages" when referring to such relationships, though "customary marriage" is still used occasionally when referring to South Africa's statutory system, or when quoting other authors.

16 See e.g. *The Queen v "Bear's Shin Bone."* (1899), 3 CCC 329, 1899 CanLII 111 (NWTSC) [*Bear's Shin Bone* cited to CCC].

quasi-acknowledgment,[17] South Africa has codified their validity and operation within its *Recognition of Customary Marriages Act, 1998*.[18] However, even this system has proven to be far from perfect in either its function or philosophy. In many ways it simply perpetuates the prior colonial notion that Indigenous traditional laws are only valid as far as they align with European common law or legislated norms. Rather than empowering living, evolving South African Indigenous legal structures in their own right, the *RCMA* forces compliance with a statutory system that also equates customary marriages with civil marriages while discarding almost everything that makes the customary marriages ideologically distinct.

The misrecognition of Indigenous-law marriages through simple equation with civil marriages leads to serious harm and genuine social consequences. As Leon Sheleff puts it:

> The manner in which customary law is perceived is of vital importance…. A perception of custom as some formalized relic of backward people, will lead to certain inescapable consequences, that customs can only be recognized if they are of longstanding

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17 See e.g. the discussion in Richard Chisholm, "Aboriginal Law in Australia: The Law Reform Commission's Proposals for Recognition" (1988) 10:1 U Haw L Rev 47.

18 (S Afr), No 120 of 1998 [*RCMA*].

> usage, and once recognized, cannot be changed.[19]

Indeed, as Nancy Fraser argues in the context of non-heterosexual relationships, "misrecognition constitutes a fundamental injustice"[20] since it impedes a parity of participation in the legal rights enjoyed by other married couples in the dominant society. Moreover, it prevents the exercise of legal rights and privileges that were historically enjoyed by sovereign Indigenous peoples for thousands of years before colonization. "Far from occupying some wispy, ethereal realm,"[21] the consequences of misrecognition "are material in their existence and effects."[22]

As the Court of Appeal for Ontario stated in *Halpern v Canada (Attorney General*), "[t]he societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked."[23] Marriage is "one of the most significant

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19 Leon Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London: Routledge, 1999) at 84.

20 Nancy Fraser, "Heterosexism, Misrecognition, and Capitalism: A Response to Judith Butler" (1997) 52/53 Social Text 279 at 281–82. While Fraser's article discusses misrecognition in the context of LGBTQ individuals, Fraser explicitly recognizes that her argument also applies to racial or cultural misrecognition.

21 *Ibid* at 282.

22 *Ibid*.

23 (2003), 225 DLR (4th) 529 at para 107, 2003 CanLII 26403 (ON CA) [*Halpern*].

forms of personal relationships,"[24] yet Indigenous Canadians are functionally excluded from their *own* legal forms of marriage except insofar as they align with European norms. This perpetuates the view that they are not truly spouses until state says they are, and even then often only to a limited extent.

This essay aims to explore three options for the recognition of Indigenous-law marriages by examining two existing methods within the legal structures of Canada and South Africa, and a third theoretical proposal. Part II of this essay will focus on the Canadian method of recognition called "Admittance as Fact." It first explores the recognition of Indigenous marriages conducted according to Indigenous customs within historical case law to determine the status of such marriages prior to 1982, before moving into a discussion of their current Canadian constitutional classification as Aboriginal rights. Part III then turns to the system in South Africa called "Codification." It will inspect the most relevant provisions of the *RCMA* relating to the statutory requirements to establish a valid customary marriage in South Africa, and survey how these provisions have been interpreted by the courts. Each Part will conclude with a critique of the respective method of recognition from a functional and substantive perspective. Finally, Part IV will argue that neither of these methods appropriately recognize the inherent value of marriage, but instead perpetuate a form of political violence that devalues and dehumanizes Indigenous cultures. A third method of recognition will be proposed, called "Side-by-Side Existence," which

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24 *Ibid* at para 5.

recommends that Canada acknowledge a system of self-regulation and internal dispute resolution.

A brief word must be said at the outset about what this essay does not attempt to do. It is not an attempt to exhaustively lay out the entirety of Canadian or South African Indigenous family law, nor does it explore every effect of marriage within their legal systems. Instead, this essay is narrowly focused on comparing how these two countries recognize the *validity* and *status* of Indigenous-law marriages as compared to civil marriages. As such, the proprietary, progenitive, or patrimonial consequences of marriage will only be considered insofar as they arise in such discussions of validity or status—for example, how marriage registration systems that are necessary for validity impact the property of unregistered polygamous spouses.[25]

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[25] As a note on terminology, "polygamous" (meaning "multiple spouses") will be the preferred term of this essay, as opposed to "polygynous" (meaning "multiple wives") or "polyandrous" (meaning "multiple husbands"). While the vast majority of Indigenous cultures in Canada and South Africa that have plural marriages are polygynous, some Inuit and South African cultures are, in fact, polyandrous (see Auger, *supra* note 8 at 168; Johan D van der Vyver, "Multi-Tiered Marriages in South Africa" in Joel E Nichols, ed, *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriages and the Boundaries of Civil Law and Religion* (Cambridge: Cambridge University Press, 2012) 200 at 208). Excluding them through narrow terminology would be arbitrary and unfair.

## II. CANADA – ADMITTANCE AS FACT

### A. RECOGNITION IN CASE LAW

Prior to the affirmation of Aboriginal rights in the *Constitution Act, 1982*,[26] Indigenous-law marriages drew their validity within Canadian law from their recognition by courts. Yet in all cases where such marriages were considered by the judiciary, the validity or invalidity of the marriage was only secondary to the principal issue before the court. In fact, in most cases, the validity of the marriage was not seen as a matter of Canadian law at all, but rather an issue of foreign law and its interaction with Canadian civil, statutory, or common law requirements; that is, these cases presented a problem to be decided by the rules surrounding the international conflict of laws. Morse argues that "[t]he clear weight of these decisions supports the validity of Indian and Inuit customary law concerning marriage, divorce, and adoption, as well as their impact upon inheritance, spousal immunity in evidence, and related matters."[27] As we will see, this statement is only partially correct, and obscures the fact that the recognition of operational validity within Canadian law is not identical to the recognition of independent substantive validity.

The bulk of Canadian decisions can usefully be divided into three categories: estate cases, where the

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26 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1) [*CA, 1982*].

27 Bradford W Morse, "Indigenous Law and State Legal Systems: Conflict and Compatibility" in Bradford W Morse & Gordon R Woodman, eds, *Indigenous Law and the State* (Dordrecht, Netherlands: Foris Publications, 1988) 101 at 108.

primary issue was determining the legitimacy of one or more heirs; wives' evidence cases, where the primary issue was whether a spouse was a compellable witness; and polygamy cases, where the primary issue was whether the accused was married to more than one spouse at the same time.[28] We will examine each of these categories in turn, and attempt to identify the nuances in argumentation that were used to restrict the recognition of Indigenous-law marriages to solve the precise issue at hand.

## 1. Estate Cases

The first case that we know of to grapple with the validity of an Indigenous-law marriage in Canada was *Tranchemontagne v Monteferrand*,[29] an unreported decision out of the Superior Court of Lower Canada in 1854. Hugh Faris had married a Métis woman named Josephte Mainville, presumably within Métis territory since the Court refers to their marriage as being "according to the custom of the country," though this is never made explicit.[30] There appears to have been no formal ceremony, "but simply cohabitation and reputation."[31] A daughter, Louise Faris, was born of the marriage, who in turn married

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28 See Auger, *supra* note 8 at 11, where he identifies these same categories. The author is in Auger's debt for this simple but helpful division.

29 (27 October 1854), Montreal No 286 (Sup Ct LC) [*Tranchemontagne*], quoted in full in *Connolly v Woolrich* (1867), 1 CNLC 70, [1867] QJ No 1 (QL) at paras 145–47 (Que Sup Ct) [*Connolly* cited to QL], online: <peel.library.ualberta.ca/bibliography/476/4.html>.

30 *Ibid* at para 145.

31 *Ibid*.

M. Montferrand.[32] After Hugh's death, his lands were seized and due to be inherited by Louise, but this was opposed by Hugh's nephew, Charles Faris, on the grounds that Louise was illegitimate and that Charles was the rightful heir.[33] As Morse points out, Louise's "claim to the realty depended solely…upon the validity of the marriage."[34] The three-member panel of judges ruled in favour of Louise without providing any reasons for their decision.[35]

Nevertheless, a decidedly more fulsome opinion was provided in the next case to deal with the issue, which is generally regarded as the *locus classicus* in this area: *Connolly v Woolrich*.[36] William Connolly—a French Canadian from Lachine, Québec—travelled with the fur trade, and while working near the *Rivière aux Rats* in the Athabaska territory of what is now northern Alberta,[37] he

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32 *Ibid*.

33 *Ibid*.

34 Morse, "Indian and Inuit Family Law", *supra* note 14 at 222.

35 *Connolly*, *supra* note 29 at para 147.

36 *Supra* note 29. See also Mark D Walters, "The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150" (2017) 22:3 Rev Const Stud 347 at 349; Morse, "Indian and Inuit Family Law," *supra* note 14 at 222; Norman K Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases," [1984] 4 CNLR 1 at 1 [Zlotkin, "Judicial Recognition"].

37 This is according to Justice Monk in *Connolly*, *supra* note 29 at para 9. Modern historians now place Connolly's trading post in northern Manitoba: see Walters, *supra* note 36 at 350.

married the daughter of a Cree chief in 1803.[38] His wife is referred to throughout the decision as Susanne *Pas-de-nom*,[39] meaning Susanne No-Name, though Susanne did of course have a name which was neither *Pas-de-nom* nor Susanne. Her Cree name was Miyo Nipay, meaning "Beautiful Leaf."[40] William "continually acknowledged and treated [Miyo Nipay] as his wife" for twenty-eight years, having several children with her.[41] One of their daughters, Amelia, was later married to Sir James Douglas, the eventual governor of British Columbia.[42]

However, upon their return to Québec, William abandoned Miyo Nipay and married instead his second cousin, Julia Woolrich, with whom he had two more children.[43] William died in 1849 and left his entire estate to Julia and his children by her. But one of his sons by Miyo Nipay, John Connolly, sued on the basis that William had died while married to his mother, the second marriage being a nullity. If this was the case, then half of William's estate automatically should have gone to Miyo Nipay under Lower Canada's community of property regime.[44]

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38 *Connolly*, *supra* note 29 at paras 2, 8.

39 *Ibid*.

40 Walters, *supra* note 36 at 366. See also Sylvia Van Kirk, "Tracing the Fortunes of Five Founding Families of Victoria" (1997/8) 115/116 BC Studies 149 at 152.

41 *Connolly*, *supra* note 29 at para 8.

42 Walters, *supra* note 36 at 352.

43 *Connolly*, *supra* note 29 at paras 9–10.

44 Walters, *supra* note 36 at 352.

Since British law had not yet extended to the territory in which the marriage took place by 1803, and since William Connolly had apparently acceded to Cree law in the solemnization of the marriage,[45] Justice Monk of the Québec Superior Court did not attempt to determine whether the legalities of a Cree marriage should be recognized on their own terms under Canadian law. Rather, he treated the issue as one of a foreign marriage—*à la façon du pays*—and its application to the family law of Lower Canada. This required two distinct inquiries: first, whether the marriage was indeed valid under Cree law as it existed at the time; and second, whether the marriage exhibited enough requisite characteristics of a civil marriage that it could be recognized by European law.[46]

In the first matter, Monk J. examined an extensive array of historical and testimonial evidence before concluding that a law of marriage did exist among the "barbarians," and commending them for "approach[ing] so near to the holy inculcations of Christianity" through the aid of natural theology—a doctrine holding that the Christian God had made certain general moral rules discoverable through nature alone.[47] Further, William and Miyo Nipay were indeed married according to this Cree law, as demonstrated by their continual cohabitation and his "repeated and solemn declarations that he had married his Indian wife according to the usages and customs of her

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45 *Connolly*, *supra* note 29 at para 8.

46 Zlotkin, "Judicial Recognition", *supra* note 36 at 2.

47 *Connolly*, *supra* note 29 at para 93. See also Andrew Chignell & Derk Pereboom, "Natural Theology and Natural Religion" in N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Fall 2020 ed, online: <plato.stanford.edu/entries/natural-theology>.

tribe or nation."[48] As such, Monk J. held that William and Miyo Nipay were married under the *lex loci celebrationis*.

Turning to whether that marriage should be recognized by the *lex fori*, however, Monk J. disregarded any aspects of Cree marriage laws that did not resemble European customs, including the fact that William had apparently repudiated Miyo Nipay in a manner that would have been sufficient to constitute a divorce under Cree law.[49] As Norman Zlotkin explains it, Monk J. held that a "foreign marriage"—such as a marriage solemnized in Cree territory—"would be recognized…if the marriage had certain basic characteristics: if it was voluntary; it must have been intended by the parties to last for life; and it must not have been polygamous."[50] That is, it would be valid in Québec if it fit the common law definition of marriage, as best enunciated in *Hyde v Hyde & Woodmansee*:[51] "the voluntary union for life of one man and one woman, to the exclusion of all others."[52] Since the marriage of William and Miyo Nipay met these characteristics, it was sufficient to constitute a valid marriage in Québec; however, the repudiation was insufficient to constitute a divorce, since William had to comply with Québec's divorce requirements once back in that province. Thus, William's marriage with Julia Connolly was a nullity.[53]

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48 *Conolly*, *supra* note 29 at para 94.

49 *Ibid* at para 158.

50 Zlotkin, "Judicial Recognition", *supra* note 36 at 2.

51 *Hyde v Hyde* (1866), LR 1 P&D at 130.

52 *Ibid*.

53 *Connolly*, *supra* note 29 at para 168.

The case was appealed to the Court of Appeal of Québec,[54] which dismissed it. A subsequent appeal to the Judicial Committee of the Privy Council was abandoned after an out-of-court settlement was reached, likely due to the influence and embarrassment of Amelia Douglas and her politically powerful husband.[55] This left Monk J.'s opinion as the definitive statement on the issue and the one which was largely adhered to by Canadian courts until at least 1982. This also created the unfortunate precedent that Indigenous-law marriages were to be recognized, as Mark Walters puts it, "because [they] approximated the Christian ideal of marriage"[56] and because they satisfied the requisite elements of a civil marriage, but not because they held any independent force of law.

The reasoning in *Connolly* was applied virtually unchanged in the next estate case, *Robb v Robb et al*.[57] William Robb married Supul-Catle, the daughter of a Comox chief, according to Comox law, which required the payment of a bride-price and the giving of presents to her family.[58] After his death, their daughter Sarah became involved in a dispute with William's mother over the validity of the marriage, and hence Sarah's legitimacy. Following the reasoning in *Connolly*, and quoting that case directly, the Court held that "when a doubt exists as to the legitimacy of a marriage, courts of justice are bound to

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54 *Johnstone v Connolly* (1869), 1 RL 253, [1869] JQ No 1 (QL) (QCA).

55 See Walters, *supra* note 36 at 352.

56 *Ibid* at 365.

57 *Robb v Robb* (1891), 20 OR 591, 3 CNLC 613 (H Ct J (Com Pleas Div)) [*Robb* cited to OR].

58 Auger, *supra* note 8 at 16–17.

decide in favour of the alleged marriage."[59] The Court held that since the marriage met the requirements of a valid civil marriage—it was consensual, permanent, and monogamous—it was valid under Canadian law.

Finally in this category, and perhaps most interestingly since it is one of the few cases to deal with Indigenous-law marriages after the introduction of Canadian law to the territories concerned, is *Noah Estate (Re)*.[60] Noah was an Inuk from Cape Dyer on Baffin Island, who married Igah "in accordance with Eskimo custom."[61] When Noah died, neither Igah nor their daughter Jeannie could claim his estate or survivor benefits if they were not legally married. The Department of Northern Affairs argued that Igah was simply Noah's "concubine" since, when Noah died, they were engaged in an Inuit custom of a trial marriage.[62]

Justice Sissons forcefully rejected this argument. He opined that the "suggestion that Noah did not wish to marry Igah but to have her as his concubine is pure fantasy."[63] The two had adhered to every requirement that Inuit culture demanded of them for a valid marriage,

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59 *Robb*, *supra* note 57 at 597, quoting *Connolly*, *supra* note 29 at para 167.

60 (1961), 32 DLR (2d) 185, 1961 CanLII 442 (NWTTC) [*Noah Estate* cited to DLR].

61 *Ibid* at 195. Note that Noah and Igah do not have Europeanized surnames. Instead, alpha-numeric codes (which have been omitted here) are used to identify them (*ibid* at 188).

62 *Ibid* at 195.

63 *Ibid* at 197.

including obtaining their parents' consent and cohabiting until his death.[64] The fact that the marriage did not strictly comply with the *Marriage Ordinance*[65] of the North West Territories was inconsequential since that statute contained no provision that an Indigenous marriage was invalid,[66] and in any case, Noah's marriage "seems to comply in every respect with the requirements of what was known, according to the old law of England, as a consensual marriage, that is formed or existing by mere consent."[67] Sissons J. concluded that "[i]t would be monstrous to hold that the law of England respecting the solemnization of marriage is applicable to them."[68] Thus, the marriage was valid—as in *Connolly*—because it fit the requirements of a civil marriage under English common law, but also because Canadian legislation, which was in force within the territory at the time of solemnization, did not directly invalidate it.[69]

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64 *Ibid*.

65 RONWT 1956, c 64.

66 *Noah Estate*, *supra* note 60 at 199.

67 *Ibid* at 197.

68 *Ibid* at 200, quoting *The Queen v Nan-E-Quis-A-Ka*, (1889) 1 Terr L Rep 211 (Terr Ct) at 215 [*Nan-E-Quis-A-Ka*].

69 Notably, Justice Sissons was the first to recognize the validity of customary adoptions in *Katie's Adoption Petition (Re)* (1961), 32 DLR (2d) 686, 1961 CanLII 443 (NWTTC), in the same year and following largely the same logic. See also WG Morrow, "Mr. Justice John Howard Sissons" (1966) 5:2 Alta L Rev 254 at 258.

## 2. Wives' Evidence Cases

We have already seen in *Williams* that Canadian courts were prepared to apply the common law privilege of non-compellability of spouses to Indigenous-law marriages if they fit the requirements for validity as set out in *Connolly*. In that case, Jennie Williams was held not to be a compellable witness because she was, at the time of the alleged murder of Ernest Jack, the wife of Tom Williams.[70] Yet just as in *Connolly*, the fact that Tom and Jennie were actually divorced according to Kwakwaka'wakw custom by the time of the trial was irrelevant since, although their *marriage* could be analogized to a European marriage, such a *divorce* was repugnant to European law and so could not be recognized.[71]

The judgment in *Williams* relied on the prior decision in *The Queen v Nan-E-Quis-A-Ka*, where the accused was charged with assault causing bodily harm.[72] The Crown sought to introduce the evidence of two women, Maggie and Keewasens, but the defence argued that they were both his wives according to his (unidentified) Indigenous custom. Justice Wetmore held that such marriages were valid provided that they were consensual and "neither of the parties had a husband or wife, as the case might be, living at the time."[73] Therefore, although the accused's first marriage with Maggie was held

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70 *Williams*, *supra* note 6 at 128.

71 *Ibid* at 128. See also *Connolly*, *supra* note 29 at para 168. Jennie had redeemed herself by repaying her bride price.

72 *Supra* note 68 at 211.

73 *Ibid* at 215.

to be valid, and so her testimony could not be compelled, the second marriage with Keewasens was invalid because it was polygamous.[74] While the case is notable for recognizing, as in *Noah Estate*, that Indigenous-law marriages could validly be entered into even after the reception of English law,[75] they were again only recognized so far as they aligned with the rights and requirements of civil marriages.

This is also seen in *Ex Parte Cote*,[76] where Barbara Cote was found guilty of contempt after she refused to testify in the trial of her Indigenous-law husband, Wilfred Severight. While a lower court held that Barbara's marriage satisfied both the requirements of her own culture and the above-noted requirements for recognition as a civil marriage,[77] the Court of Appeal for Saskatchewan overturned this decision based on the Court's opinion that the relationship was not a marriage at all, but simply a common-law relationship, which are not afforded the privilege of non-compellability.[78] Although Barbara likely would have had such protection were she found to be in a proper Indigenous-law marriage, the Court did not see their

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74 *Ibid*.

75 See Norman Zlotkin, "From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada," in Catherine Bell & Robert K Paterson, eds, *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform* (Vancouver: UBC Press, 2009) 343 at 347 [Zlotkin, "From Time Immemorial"].

76 *Ex Parte Cote*, *supra* note 13.

77 *Cote (Re)* (1971), 19 DLR (3d) 486, 1971 CanLII 811 (SKQB).

78 *Ex Parte Cote*, *supra* note 13 at paras 16, 24.

relationship in this light.[79] In this respect, the case was almost certainly wrongly decided: Barbara and Wilfred were inarguably married according to their customs, and she should have been afforded the same protections granted to other spouses in Canadian courts.[80]

### 3. Polygamy Cases

Despite the fact that polygamy was historically fairly common among some Indigenous Peoples,[81] the practice was only banned in 1890 to target the influx of Mormons into southern Alberta,[82] and there is a relative dearth of case law for prosecutions. As we have seen in the case of *Nan-E-Quis-A-Ka*, this could possibly be attributed to the fact

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79 Alan Hilton, in his case comment "The Validity of Common Law Marriages" (1973) 19:4 McGill LJ 577, argues that the appeal likely would have failed in any case since *The Marriage Act*, RSS 1965, c 308 (at the time) covered the field and so barred Indigenous-law marriages (*ibid* at 582). This argument ignores that provincial laws are inapplicable to the extent that they tread upon core matters of Indigenous identity, which are under the exclusive jurisdiction of federal Parliament (see e.g. *Dick v R*, [1985] 2 SCR 309 at para 12, 1985 CanLII 80). Further, Hilton's suggestion that the mere mention of the Doukhobor sect within *The Marriage Act* implies an exclusion of all other distinct marriage-solemnization practices lacks substantiation.

80 See Morse, "Indian and Inuit Family Law", *supra* note 14 at 238; Zlotkin, "From Time Immemorial", *supra* note 75 at 348.

81 For a full and fascinating discussion on the topic, see Sarah A Carter, "Creating 'Semi-Widows' and 'Supernumerary Wives': Prohibiting Polygamy in Prairie Canada's Aboriginal Communities to 1900" in Katie Pickles & Kyra Rutherdale, eds, *Contact Zones: Aboriginal and Settler Women in Canada's Colonial Past* (Vancouver: UBC Press, 2005) at 131.

82 See *ibid* at 145.

that plural Indigenous-law marriages were, for the most part, treated as being invalid. No offence was committed despite the alleged immorality of such relationships[83] because the subsequent marriage was not seen as a marriage at all.

However, *The Queen v "Bear's Shin Bone"* represents one such case.[84] The accused was married to two women, "Free Cutter Woman" and "Killed Herself", according to the customs of the Blood Indian Tribe.[85] Relying on *Nan-E-Quis-A-Ka*, the Court held that such relationships fell within the definition of polygamy. Both women "were living with him as his wives, and…there was a form of contract between the parties which they supposed binding upon them."[86] Accordingly, the accused was convicted.

## B. RECOGNITION IN THE CONSTITUTION

This was the state of the law in Canada prior to 1982. Indigenous-law marriages were recognized on an *ad hoc* basis, but only when they could be analogized to civil marriages and when such a finding of validity was necessary in order to determine a distinct issue. This picture changed only slightly after the affirmation of

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83 See *ibid* at 135.

84 *Supra* note 16. See also Auger, *supra* note 8 at 24. This source mentions one other polygamy case: an unreported decision mentioned in a background paper by another scholar. This author has been unable to independently locate the case and directs the reader to those sources.

85 See *Bear's Shin Bone*, *supra* note 16 at 329.

86 *Ibid* at 329.

Aboriginal rights within s. 35 of the *CA, 1982*,[87] since such marriages will likely be recognized as being Aboriginal rights "in appropriate situations."[88] While Indigenous-law marriages have received some level of constitutional protection within Canadian law, we shall see that such protection is still largely dependent upon the very specific circumstances of the matter at hand, and can still only be confirmed on a case-by-case basis.

This dependency on circumstances arises because establishing the existence of an Aboriginal right within the complicated system of s. 35 jurisprudence that has developed over the last forty years requires that individuals claiming such a right prove that they were acting in accordance with "a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[89] Further, such a practice must have been in existence prior to contact between that Indigenous group and Europeans,[90] and must not have been extinguished by the Crown prior to the constitutional protection of Aboriginal rights in 1982.[91] Therefore, an Aboriginal right to marry in accordance with a particular custom *could* exist, but must still be proven by a claimant on the evidence, and the opportunity to do so will still only arise in situations where the claimant is before the court for some

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87 *Supra* note 26.

88 Zlotkin, "From Time Immemorial", *supra* note 75 at 350.

89 *R v Van der Peet*, [1996] 2 SCR 507 at para 46, 1996 CanLII 216 [*Van der Peet*].

90 See *ibid* at para 60.

91 See *ibid* at para 125; *Mitchell v MNR*, 2001 SCC 33 at paras 10–11.

other issue and the validity of the marriage must be proven in order to solve that issue.

Meeting the high bar established by the s. 35 jurisprudence can be particularly difficult for a claimant in such a situation since the marital customs among various Indigenous nations are, to say the least, intricate and diverse. Indeed, Morse states that "[i]t is virtually impossible for anyone, especially someone trained in the law, to describe the family laws of the Indian, the Métis, and the Inuit peoples of Canada in [anything] other than broad generalities."[92] A few brief examples can demonstrate the "practices, customs and traditions"[93] of marriage solemnization among Indigenous Peoples in Canada which a s. 35 claimant would have to prove that they were carrying out, and where even slight deviations or evidence of post-European-contact developments could lead to invalidity of their marriage.

We have already seen in *Noah Estate* that Inuit custom on Baffin Island requires a trial marriage with the consent of both families.[94] This is similar to the Dakota, except that that nation does not consider the trial to have begun until several weeks of cohabitation have already elapsed, and the trial must last for over a year before the community considers the couple to be permanently married.[95] Unlike the Inuit of Baffin Island, however, no parental consent or dowry is required among the Dakota,

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92 Morse, "Indian and Inuit Family Law", *supra* note 14 at 207.

93 *Van der Peet*, *supra* note 89 at para 44.

94 *Supra* note 60 at 195.

95 Morse, "Indian and Inuit Family Law", *supra* note 14 at 214.

and there is no ceremony or formal solemnization.[96] The ceremonies among the Cree are much more formal, where the law requires a suitor to "present gifts to the woman's parents and to obtain their initial consent to the marriage. The young couple then go to all the elders of the community with token presents and ask for their blessing."[97] An elaborate day-long ceremony is then conducted, and the couple is not formally wed until it is complete.

Among the Northern Ojibwe a potential husband must go to his parents and ask them to arrange a marriage with the parents of his potential wife.[98] His parents will usually initiate this conversation with her parents by bringing a gift, and once both sets of parents consent to the union and determine that the appropriate kinship requirements are met, the couple can marry one another.[99] Kinship requirements are also particularly important to the nations of the Iroquois Confederacy where matriarchal clan mothers will arrange marriages with the requirement that brides and grooms come from different clans;[100] meanwhile, "Interior Salish and Carrier Indians entirely prohibit marriage within the bands, as all band members are considered brothers and sisters."[101]

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96 See *ibid* at 215.

97 *Ibid*.

98 See Auger, *supra* note 8 at 160.

99 See *ibid*.

100 See Morse "Indian and Inuit Family Law", *supra* note 14 at 216.

101 *Ibid*.

As was the case with Jennie Williams, many nations require a bride-price to be paid to obtain a spouse, which can then be repaid to effectuate a divorce. Some Inuit groups additionally require from the husband "a promise to adhere to the 'bride-service' custom by which he hunts and fishes for her family for up to a year."[102] Husbands among the Kwakwaka'wakw people have to pay a dowry to the bride's father or guardian, but the wife can repay the husband "usually twice or three times the amount he gave for her" in order to divorce herself.[103] However, among the Dakota[104] and the Northern Ojibwe[105] couples can divorce simply by leaving the matrimonial home and going their own way, in which case they are free to remarry.

Any couple that weds one another in adherence to such customs would be married according to their own laws and in accordance with an Aboriginal right protected by s. 35. But from the perspective of the state—as we saw with Barbara Cote—they would simply be in a common-law relationship and potentially without the rights and protections enjoyed by other spouses in the dominant culture *until* such an Aboriginal right has been verified in court. Proving the validity of their marriage would require one or both spouses to demonstrate: (1) that the "custom" of their wedding was integral to their distinctive pre-contact Indigenous culture; (2) that they were married in strict adherence to this custom; and (3) that such a marriage

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102 *Ibid* at 216.

103 *Williams*, *supra* note 6 at 128.

104 See Morse "Indian and Inuit Family Law", *supra* note 14 at 215.

105 See Auger, *supra* note 8 at 174.

custom had not been extinguished by the Crown prior to 1982. Any failure in this process could have the potentially dire consequence of nullifying what they believed and intended to be a lawful marriage.

Such a tragic outcome was seen in *Manychief v Poffenroth*[106] where Delia Manychief believed herself to be married to Darrel Daniels according to her Blood Indian custom. Darrel was killed in a car accident in 1990 after they had been "married" for eight years, and Delia sought survivor benefits as his wife under Alberta's *Fatal Accidents Act*.[107] The Court examined her evidence, where she testified that she and Darrel obtained their parents' consent and the advice of an elder before they commenced living together in 1982.[108] Although she did not claim him as her spouse on her income tax returns, she understood herself to be married in "[their] way of life."[109] The Court also heard from "Priscilla Bruised Head, an elder of the band, [who] testified as an expert on Indian customs."[110] Priscilla claimed that marriages used to be arranged on the Reserve, but that younger couples now preferred to be married in church ceremonies, something which Delia and Darrel planned to do one day.[111]

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106 *Supra* note 13.

107 See RSA 1980, c F-5 [*FAA*], as repealed by *Fatal Accidents Act*, RSA 2000, c F-8.

108 See *Manychief*, *supra* note 13 at paras 6–8.

109 See *ibid* at paras 8, 11.

110 *Ibid* at para 13.

111 See *ibid*.

Justice McBain recognized that an Indigenous-law marriage was an Aboriginal right guaranteed by s. 35, but only if it could be shown that such a custom was "an 'integral part' of a 'distinctive' [A]boriginal culture."[112] While the Court rightly acknowledged that Alberta's *Marriage Act*[113] did not extinguish any such Aboriginal right, nor could it as a provincial statute, Delia Manychief failed to establish that she had acted in accordance with an Aboriginal right when she married Darrel. The marriage was not arranged, as Priscilla Bruised Head testified had occurred in the past, nor was there any exchange of gifts or delivery of the bride.[114] Thus, the Court held that "the relationship in the case at bar was nothing more than the type of common-law relationship one frequently sees in the non-[N]ative community," and Delia was not a "wife" under the *FAA*.[115]

## C. CRITIQUE

*Manychief* clearly demonstrates that, despite being recognized and affirmed by s. 35 of the *CA, 1982*, Indigenous-law marriages in Canada largely remain in the same legal position as they were before 1982. Not only must they be proven on the evidence on an *ad hoc* basis, but even when they are, they are recognized as being substantively and functionally identical to a civil marriage. None of the special rights or privileges that the specific

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112 *Ibid* at para 28.

113 See RSA 1980, c M-6, as repealed by *Marriage Act,* RSA 2000, c M-5.

114 See *Manychief*, *supra* note 13 at paras 69–70.

115 *Ibid* at para 77, 80.

Indigenous culture might understand to be attendant upon their marriage transfer into the Canadian legal system, and marriages which do not meet the civil marriage requirements of voluntariness, permanence, and exclusivity are unlikely to be recognized at all. Essentially, they are treated as a foreign-solemnized marriage functioning within Canadian law.

Hence, the Canadian method of recognition is best described as "Admittance as Fact."[116] The validity of an Indigenous-law marriage is dependent upon the evidence presented to establish its existence and, even when such a marriage is acknowledged, it only goes as far as to demonstrate the legal fact that a marriage has occurred, which must then be applied to Canadian law. Thus, there are two fundamentally problematic aspects to this method of recognition: the *admittance* aspect, which places an unjustly high evidentiary burden on the spouses of the union to establish its existence, and the *fact* aspect, which strips the marriage of all its inherent value and forces it into a European mould.

First, as was seen in all the cases that we have examined, the mere task of having an Indigenous-law marriage *admitted* by a court as having occurred at all is a herculean labour compared to the ease of proving a solemnized and registered civil marriage. Indigenous marital practices are intricate, complicated, diverse, and

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[116] The term is one of several options for Indigenous-law recognition described in Bradford W Morse & Gordon R Woodman, "Introductory Essay: The State's Options" in Morse & Woodman, *supra* note 27, 5 at 10.

often concealed from those outside the community,[117] involving traditions and spiritual rituals that date back long before written records could document any particular requirements of solemnization. Morse states that "[i]t is impossible to delineate a single set of principles adhered to by all native people."[118] Yet the Canadian method of recognition expects not only that spouses will be able to properly and fully enunciate their distinctive cultural practices and their own strict adherence to them, but also—and more problematically—that the judge will be able to detect the subtle but decisive nuances in solemnization and determine whether these resulted in a valid marriage. Walters phrases this dilemma succinctly:

> For a judge to identify one norm from this set of complex and shifting normative narratives and practices and enforce it with the crispness of a common law rule, in effect detaching it from the structures of governance out of which it emerges, may do far more damage than good.[119]

Further, by requiring Indigenous solemnization practices to have been in existence before European contact as a requirement for state recognition, the Canadian method has essentially frozen the cultural development of Indigenous legal traditions. In *Manychief*, McBain J.

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[117] For example, in Nisga'a culture it is forbidden to share "the ancient law" outside one's own tribe: see Kirsten Manley-Casimir, "Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative" (2012) 30 Windsor Y B Access Just 137 at 157.

[118] Morse, "Indian and Inuit Family Law", *supra* note 14 at 216.

[119] Walters, *supra* note 36 at 368.

opined that even if Delia Manychief and Darrel Daniels were married according to their Blood Indian custom, "it is accurate to say that right has now evolved to the point where it *is no longer an integral component of the Natives' traditional way of life or culture*."[120] Unless an Indigenous group maintains their solemnization practices precisely as they existed pre-contact, such practices will be deemed to be non-Indigenous, or non-integral. As Sheleff argues, such an arbitrary temporal requirement "dooms that very culture to stagnation, and ultimately rejection, by imposing on it a rigidity which is generally by no means inherent in its nature."[121]

Second, even once a marriage is admitted, the legal *fact* that the spouses will establish is simply that a civil marriage was solemnized in an unusual way. Any proprietary or patrimonial consequences, and any potential for divorce or redemption according to Indigenous laws, evaporates upon recognition by the Canadian legal system. Instead, the spouses must adhere to a system of family laws which, in all likelihood, is not only foreign to the practical needs of their society, but also to the spiritual, cosmological, and axiological demands of their culture. What can the Canadian family-law system say to placate the ancestor spirits of the Kwakwaka'wakw people in a divorce proceeding? How should the common law handle the return of Jennie Williams's bride-price? As Aaron Mills argues, "[o]ne can't simply translate law across

120 *Manychief*, *supra* note 13 at para 78 [emphasis in original].

121 Sheleff, *supra* note 19 at 85.

distinct constitutional contexts and expect it to retain its integrity and thus its functionality."[122]

By misrecognizing Indigenous-law marriages as being equivalent to civil marriages, the Canadian method of recognition merely continues to position the European model of marriage as being authoritative—it is the scale on which all Indigenous-law marriages will be weighed and found wanting. In short, the Canadian Admittance as Fact method perpetuates a form of cultural and political violence by misrecognizing Indigenous-law marriages as being at once less-than and foreign-to civil marriages, but *good enough* to be recognized as such for the narrow purposes of Canadian family law.

## III. SOUTH AFRICA – CODIFICATION

### A. THE STATUTORY FRAMEWORK

As a young democracy, South Africa is widely regarded as having a remarkably progressive constitution,[123] and a liberal system of laws that have arisen from it.[124] South

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122 Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 854–55.

123 See *Constitution of the Republic of South Africa, 1996*, No 108 of 1996 [*CRSA*].

124 See e.g. Mothokoa Mamashela, "New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act" (2004) 20:4 SAJHR 616 at 619; Tracy E Higgins, Jeanmarie Fenrich & Ziona Tanzer, "Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism" (2007) 30:6 Fordham Intl LJ 1653 at 1654; Ntebo L Morudu & Charles Maimela, "The Indigenisation of Customary Law: Creating

> Africa is a nation which has grown, within the last generation, to place a high value upon the traditional laws of its Indigenous peoples[125] and to treat those laws on an equal footing with the colonial English and Roman-Dutch legal systems that the democracy inherited.[126] Indeed, as Deputy Chief Justice Langa—as he then was—of the Constitutional Court of South Africa stated in a seminal case dealing with the application of customary law, "[c]ertain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution."[127]

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an Indigenous Legal Pluralism within the South African Dispensation: Possible or Not?" (2021) 54:1 De Jure 54 at 54.

[125] The issue of which people groups should be considered "Indigenous" to South Africa is a thorny one, since the earliest occupants—the San and Khoekhoe peoples, often collectively referred to as the Khoisan—were displaced and absorbed over many centuries by the Bantu peoples who make up the majority of modern South Africa's black population. However, this is also an issue well beyond the scope of this essay, and interested readers are directed, for a brief introduction to the topic, to Laura Secorun, "South Africa's First Nations Have Been Forgotten" (19 October 2018), online: *Foreign Policy* <www.foreignpolicy.com/2018/10/19/south-africas-first-nations-have-been-forgotten-apartheid-khoisan-indigenous-rights-land-reform>.

[126] See *CRSA*, *supra* note 123, s 211.

[127] *Bhe and Others v Khayelitsha Magistrate and Others*, [2004] ZACC 17 at para 41, 2005 (1) SA 580 (CC) [*Bhe*]. See also the comments of Justice Ngcobo, writing in dissent though not on this point, at para 148: "While in the past indigenous law was seen through the common law

Nevertheless, South Africa's recognition of Indigenous-law marriages still evinces many of the same issues that we have identified within Canada's method of recognition, by casting aside most of their distinct substantive and spiritual features if they are unable to fit within the civil marriage mould. Moreover, as we shall see, South Africa's method of codifying the validity and status of Indigenous-law marriages creates its own unique set of problems: by forcing compliance with a statutory system that is, in many respects, foreign both practically and philosophically to the Indigenous participants; and by freezing the development of Indigenous marital practices through judicial precedents that must be complied with.

Before critiquing their method of recognition, however, it is necessary to establish the basic functioning of South Africa's statutory Indigenous-law marriage system. Prior to the enactment of the *RCMA*,[128] and prior to the recognition of traditional law's role within s. 211 of the *CRSA*,[129] Indigenous-law marriages were not recognized at all within South African law. I.P. Maithufi and J.C. Bekker argue that "customary marriages were, for all intents and purposes, not recognised by the South African legal system as they were polygamous or potentially polygamous. Consequently, these marriages were held to be contrary to public policy and the principles

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lens, it must now be seen as part of our law and must be considered on its own terms." For the assistance of Canadian readers, South African cases can be read online at: <www.saflii.org>.

128 See *RCMA*, *supra* note 18.

129 See *CRSA*, *supra* note 123, s 211.

of natural justice."[130] As a result, none of the consequences of that marriage were recognized by the state: a spouse in such a union could conduct a civil marriage with someone else, the spouses owed one another no duty of support, and the children of such unions would be regarded as illegitimate.[131]

Instead, Indigenous-law marriages were seen as a peculiar legal creature referred to as a "customary union"—the term "marriage" being carefully avoided—and were governed by s. 22 of the *Black Administration Act*.[132] Under this statute, such unions were considered as being a mere contract between the two families regarding

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[130] IP Maithufi & JC Bekker, "The Recognition of the Customary Marriages Act of 1998 and its Impact on Family Law in South Africa" (2002) 35:2 Comp & Intl LJ S Afr 182 at 183. See also Thandabantu Nhlapo & Chuma Himonga, eds, *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives*, 1st ed (Cape Town: Oxford University Press, 2014) at 168; TW Bennet, "Re-Introducing African Customary Law to the South African Legal System" (2009) 57:1 Am J Comp L 1 at 5. And for early judicial opinion on this, see *Seedat's Executors v The Master (Natal)*, 1917 AD 302 at 309.

[131] See Maithufi & Bekker, *supra* note 130 at 183; Nhlapo & Himonga, *supra* note 130 at 169, citing CRM Dlamini, "The Ultimate Recognition of the Customary Marriage in South Africa" (1999) 20:1 Obiter 14 at 16.

[132] (S Afr), No 38 of 1927, s 22 [*BAA*]. See the definition of a "customary union" in *ibid*, s 35. Note that customary marriages were more fully recognized in some areas of South Africa, specifically in KwaZulu-Natal (in the *KwaZulu Act 16 of 1985 on the Code of Zulu Law* (S Afr), No 16 of 1985) and in the former Transkei (in the *Transkei Marriage Act* (S Afr), No 21 of 1978). See Roxanne Juliane Kovacs, Sibongile Ndashe & Jennifer Williams, "Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women in South Africa" (2013) 2013 Acta Juridica 273 at 275.

cohabitation and the payment of a bride-price.[133] Of course, since the couple were not really married, they were free to marry one another in a civil marriage under the *Marriage Act, 1961*.[134] However, in such a scenario the *BAA* stated that the marriage was not in a community of property.[135] In place of this otherwise standard proprietary system, the "customary marriage was deemed to have created a 'house,'"[136] which the *BAA* defined as "the family and property, rights and status, which commence with, attach to, and arise out of, the customary union of each native woman."[137] In other words, a separate estate was deemed to have been created with each customary union, whose property was allocated to the wife based on customary practices, and which was distinct from the husband's own

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133 See Phindile Mdluli, "Black Marriages and Customary Marriages Before 1988" (June 2016), online: *Tomlinson Mngun James* <www.tmj.co.za/News/Read/90096>.

134 *Marriage Act, 1961* (S Afr), No 25 of 1961 [*Marriage Act*].

135 *BAA*, *supra* note 132, s 22(6). The parties were able to enter a community of property if they declared this intention before a magistrate no later than a month after the wedding (*ibid*), but unlike non-Indigenous marriages, a community of property was not the automatic default. See the *Matrimonial Property Act, 1984* (S Afr), No 88 of 1984, ss 2, 21. See also Fatima Osman, "The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?" (2019) 22 Potchefstroom Elec LJ 1 at 5 [Osman, "Million Rand Question"].

136 Maithufi & Bekker, *supra* note 130 at 188.

137 *BAA*, *supra* note 132, s 35.

property or any other "houses" which might come into existence among his other potential wives.[138]

While the *BAA* was amended in 1988 to modernize some of the proprietary consequences of such unions,[139] major reform for Indigenous-law marriages did not occur until the passing of the *RCMA* in 1998, and its coming into force on November 15, 2000.[140] Inspired by s. 211 of the *CRSA*'s admonition for courts to "apply customary law when that law is applicable,"[141] the *RCMA* officially recognized customary marriages entered into both before and after the commencement of the Act. Section 2 specifically states that "a marriage which is a valid marriage at customary law and *existing at the commencement of this Act* is for all purposes recognised as a marriage,"[142] and that a customary marriage "entered into *after the commencement of this Act*, which complies with the requirements of this Act, is for all purposes recognised as a marriage."[143]

Notably—given the fears over polygamy within the *BAA* and its era—the *RCMA* also specifically recognizes plural customary marriages, both those entered into before

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138 See Maithufi & Bekker, *supra* note 130 at 188. See also Nhlapo & Himonga, *supra* note 130 at 209.

139 See Mdluli, *supra* note 133.

140 See Maithufi & Bekker, *supra* note 130 at 183.

141 *CRSA*, *supra* note 123, s 211(3).

142 *RCMA*, *supra* note 18, s 2(1) [emphasis added].

143 *Ibid*, s 2(2) [emphasis added].

and after the commencement of the Act.[144] It lays out a set of requirements in order for future customary marriages to be valid,[145] and carefully details the method of registration that the spouses must follow.[146] The Act also sets out the proprietary consequences of customary marriages, stating that monogamous marriages are automatically "in [a] community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage."[147]

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144 *Ibid*, ss 2(3)–(4). Note that many scholars observe that, despite this recognition of polygamy, the *RCMA* appears to be designed to restrict this practice: see Thandabantu Nhlapo, "Customary Law in Post-Apartheid South Africa: Constitutional Culture, Gender and 'Living Law'" (2017) 33:1 SAJHR 1 at 11; Morudu & Maimela, *supra* note 124 at 62–63.

145 See *RCMA*, *supra* note 18, s 3.

146 See *ibid*, s 4. As we shall see below, failure to register does not officially invalidate a marriage (*ibid*, s 4(9)).

147 *Ibid*, s 7(2). Note that *all* monogamous customary marriages are automatically in a community of property, despite s 7(1), which states that "the proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law." The Constitutional Court in *Gumede (born Shange) v President of the Republic of South Africa and Others*, [2008] ZACC 23, 2009 (3) BCLR 243 (CC) held that this distinction was unconstitutional by arbitrarily singling out spouses of customary marriages solemnized before November 15, 2000, and potentially detrimentally affecting them by customary systems of matrimonial property. In *Ramuhovhi and Others v President of the Republic of South Africa and Others*, [2017] ZACC 41, 2018 (2) BCLR 217 (CC) this same provision was declared invalid with regards to polygamous marriages entered into before the commencement of the *RCMA*.

For polygamous marriages, in contrast, husbands are required to "make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages."[148] Such contracts will typically create a proprietary system similar to the "houses" of the *BAA*.[149] However, a failure to make such a contract before entering into a polygamous marriage has been held not to nullify the subsequent marriage, which would simply be out of a community of property.[150]

As with civil marriages, spouses in a customary marriage may only divorce one another by obtaining a decree of divorce from the High Court.[151] Unlike civil

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148 *RCMA*, *supra* note 18 at s 7(6). Penelope E Andrews, in her article "Who's Afraid of Polygamy - Exploring the Boundaries of Family, Equality and Custom in South Africa" (2009) 11:2 Utah L Rev 351, suggests that the *RCMA* envisages women entering into polygamous marriages with more than one man, or that gay men could enter into polygamous marriages with more than one man (*ibid* at 377). This argument is fatally flawed. It ignores that the *RCMA* permits "a husband" to enter into polygamous marriages, thus precluding heterosexual polyandry; and that the *RCMA* requires marriages to be celebrated according to customary law (*RCMA*, *supra* note 18, s 3(1)(b)), thus precluding homosexual polyandry, since this author knows of no South African cultures that are customarily homosexually polyandrous. See also Kovacs, Ndashe & Williams, *supra* note 132 at 276; Higgins, Fenrich & Tanzer, *supra* note 124 at 1695; Nhlapo & Himonga, *supra* note 130 at 205.

149 See Papa IP Maithufi, "The Requirements for Validity and Proprietary Consequences of Monogamous and Polygynous Customary Marriages in South Africa: Some Observations" (2015) 48:2 De Jure 261 at 273.

150 See *Mayelane v Ngwenyama and Another*, [2013] ZACC 14 at paras 6, 41, 2013 (8) BCLR 918 (CC) [*Mayelane*].

151 See *RCMA*, *supra* note 18, s 8. See also Mamashela, *supra* note 124 at 636.

marriages, however, such a decree will only be granted if there has been an irretrievable breakdown of the marriage,[152] whereas with a civil marriage a decree of divorce can also be obtained in circumstances of mental illness or continued unconsciousness of one of the spouses.[153] Couples in a customary marriage are also permitted to enter into a civil marriage with one another—which would have the effect of supplanting the customary marriage—but only if it is a monogamous marriage, and the husband would then be barred from entering into a subsequent polygamous marriage.[154]

## B. REQUIREMENTS FOR VALIDITY

As we saw, the *RCMA* recognizes customary marriages that were in existence at its commencement and recognizes a marriage entered into after this date "which complies with the requirements of this Act."[155] While the statutory requirements are relatively few, their interpretation and expansion by the courts have turned compliance into a dizzying labyrinth of responsibilities. Failure to observe either the requirements of the Act or the requirements of

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152 See *RCMA*, *supra* note 18, s 8(2).

153 See *Divorce Act, 1979* (S Afr), No 70 of 1979, s 3(b). See Nhlapo & Himonga, *supra* note 130 at 254–64 for an exploration of the issues surrounding divorce and the *RCMA*'s interactions with customary law.

154 See *RCMA*, *supra* note 18, s 10; Osman, "Million Rand Question", *supra* note 135 for a fulsome discussion on the problems of such "dual marriages." See also Fatima Osman, "The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage" (2019) 22:1 Potchefstroom Elec LJ 1 at 10 [Osman, "Statutory Regulation"].

155 *RCMA*, *supra* note 18, ss 2(2), 2(4).

one's customary law can lead to an invalid marriage and the loss of its attendant rights and protections. Faced with this complicated threat, Maithufi and Bekker rightly ask: "Do people who are married by customary law understand what it is all about? Can they visualize the consequences?"[156]

In any case, *we* must attempt to visualize and understand what it is all about. The *RCMA* contains two primary requirements for validity which we will explore: that the parties must be over the age of eighteen and consent to the marriage; and that the marriage must be negotiated and entered in accordance with customary law.[157] Further, while the Act states that unregistered customary marriages are not invalid solely by this lapse,[158] registration is a practical necessity since it functions as proof of the marriage for all government—and most non-government—organizations, such that registration is essentially an additional requirement for validity.[159] Each of these are worth exploration.

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156 *Supra* note 130 at 197. See also Nhlapo, *supra* note 144 at 11; Aubrey Manthwa, "*Lobolo*, Consent as Requirements for the Validity of a Customary Marriage and the Proprietary Consequences of a Customary Marriage: *N v D* (2011/3726) [2016] ZAGPJHC 163" (2017) 38:2 Obiter 438 at 442.

157 *RCMA*, *supra* note 18, s 3(1)(a)–(b).

158 *Ibid*, s 4(9).

159 While this is discussed more fully below, for an introduction to the problem of a registration's ambiguous necessity, see Nhlapo & Himonga, *supra* note 130 at 182–83.

## 1. Age and Consent

The requirement that both spouses be above the age of eighteen is one that, on its face, appears uncontroversial but has nonetheless generated considerable discussion largely beyond the scope of this essay.[160] For our purposes it is only necessary to note that, while the requirement exists, there are both statutory exceptions[161] and practical circumventions[162] that make its enforcement challenging in communities living under traditional law. Likewise, the condition that both prospective spouses consent to the marriage would also be uncontroversial in civil marriages, but this is not so straightforward a requirement under South African customary law. This is because the cultures that practice such unions almost invariably call for the consent of each spouse's family to be obtained before the marriage would be considered valid under customary law, rather than merely obtaining the consent of the two

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160 The controversy primarily surrounds the practice of *ukuthwala*, a simulated abduction of a young woman as a preliminary to marriage. See Lea Mwambene & Julia Sloth-Nielsen, "Benign Accommodation? Ukuthwala, 'Forced Marriage' and the South African Children's Act" (2011) 11:1 Afr Hum Rts LJ 1. See also Elena Moore & Chuma Himonga, "Living Customary Law and Families in South Africa" in Katherine Hall et al, eds, *South African Child Gauge 2018: Children, Families and the State: Collaboration and Contestation* (Cape Town: Children's Institute, University of Cape Town, 2018) 61 at 63.

161 See *RCMA*, *supra* note 18, s 3(4)–(5).

162 See e.g. Chuma Himonga & Elena Moore, "Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities" (2015) University of Cape Town Working Paper at 14, online: <www.academia.edu/15842003/Reform_of_Customary_Marriage_Divorce_and_Intestate_Succession>.

participants.[163] As the High Court stated in *Motsoatsoa v Roro and Others*, "a customary marriage in true African tradition…is not about the bride and the groom. It involves two families."[164]

This reasoning was laid out more fully by the High Court in *Fanti v Boto and Others*,[165] where the "consent of the bride's father or guardian" was explicitly listed as a requirement to prove the existence of a customary marriage.[166] The Court stated bluntly: "The fact of the matter is that the customary marriage is and remains an agreement between two (2) families."[167] This reasoning was favourably adopted by another decision out of the High Court, where it was held that

> One of the important elements that distinguish a customary marriage from a common law marriage is that the former

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163 Note that the statute's language, while only specifically addressing the consent of the participants to the marriage, implies such familial consent through the condition that the prospective spouses "consent to be married to each other *under customary law*" (*RCMA*, *supra* note 18, s 3(1)(a)(ii) [emphasis added]). Chuma Himonga and Elena Moore suggest that such "dual consent" (i.e. consent to marry one another, and consent to marry under customary law) consequently includes the families' consent, since customary practices such as those discussed below necessarily require this. See Chuma Himonga & Elena Moore, *Reform of Customary Marriage, Divorce and Succession in South Africa* (Claremont, SA: Juta Law, 2015) at 79. See also Manthwa, *supra* note 156 at 442.

164 2010 ZAGPJHC 122 at para 17 [*Motsoatsoa*].

165 2007 ZAWCHC 78 [*Fanti*].

166 *Ibid* at para 19.

167 *Ibid* at para 24.

> establishes marital bonds between the family of the bride and the family of the groom whereas the latter establishes a bond of marriage between the groom and the bride only.[168]

Thus, the Act incorporates the Indigenous-law concept that consent involves more than just the two spouses agreeing to the marriage. Rather, consent is a family affair.

In *Fanti* the Court explained that such familial consent often materializes in the form of an extensive ritual involving both families.[169] One such ritual is described in *Motsoatsoa*, where Justice Matlapeng wrote:

> [E]missaries are sent by the man's family to the woman's family to indicate interest in the possible marriage (this of course presupposes that the two parties man and woman have agreed to marry each other); a meeting of the parties' relatives will be convened where lobolo [bride-price] is negotiated and the negotiated lobolo or part thereof is handed over to the woman's family and the two families will agree on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration (wedding).[170]

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168 *Rasello v Chali and Others*, 2013 ZAFSHC 182 at para 16 [*Rasello*].

169 *Fanti*, *supra* note 165 at para 22.

170 *Motsoatso*, *supra* note 164 at para 17.

In that case, the family of the deceased wife contested that a customary marriage had occurred since they had not consented to any such marriage, even though they had impliedly consented to the parties' cohabitation. The Court agreed that their consent was required and ruled that no marriage had occurred.[171]

This requirement is further complicated when we turn to consider polygamous marriages. In such cases, South African courts have held that consent must be obtained from both the prospective husband's and bride's families, as well as from any existing spouse(s), since they stand to be detrimentally affected by the proprietary consequences of the union—not to mention the conjugal consequences. In *MG v BM and Others*,[172] the wife of BM claimed that she had not consented to the polygamous marriage between her deceased husband and the applicant, MG.[173] She argued this position despite the fact that she was present during the ritual negotiations, and had participated in joint family functions with MG and her children by BM.[174] The Court agreed that her consent was likely required, but such a determination was unnecessary as the evidence "overwhelmingly" indicated that she had consented, adding a superfluous barb that her "sudden change of heart…is most likely motived by the greed to exclude the applicant from the assets of the deceased."[175]

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171 See *ibid* at paras 21–23.

172 2011 ZAGPJHC 173, 2012 (2) SA 253 (HC) [cited to ZAGJHC].

173 *Ibid* at paras 2, 5.

174 *Ibid* at paras 5, 12.

175 *Ibid* at para 12.

However, in *Mayelane* the Constitutional Court definitively held that the consent of a prior spouse was required for the validity of a subsequent polygamous marriage. In that case, Modjadji Mayelane claimed that she had not consented to the marriage between her husband, Hlengani Moyana, and the respondent, Mphephu Ngwenyama.[176] While the lower courts[177] had focused on the relevant provisions of the *RCMA* and largely ignored the issue of consent,[178] the Constitutional Court held that "the consent of the first wife is necessary for the validity of a subsequent marriage."[179]

Notably, the Court achieved this result by developing the Xitsonga customary law of the parties to comply with the values of "human dignity and equality" as espoused in the *CRSA*.[180] This was the first time the Court had engaged in such "an incremental development of customary law,"[181] although s. 39(2) of the *CRSA* enjoins courts to "promote the spirit, purport and objects of the Bill

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176 *Mayelane*, *supra* note 150 at para 4. See also IP Maithufi, "Case Comment on *Modjadji Florah Mayelane v Mphephu Maria Ngwenyama*" (2013) 46:4 De Jure 1078.

177 See *Ngwenyama v Mayelane and Another*, 2012 ZASCA 94 at paras 24, 38 [*MM*].

178 See *Mayelane*, *supra* note 150 at paras 6–7. See also Liz Lewis, "Judicial 'Translation' and Contextualization of Values: Rethinking the Development of Customary Law in *Mayelane*" (2015) 18:4 PELJ 1126 at 1129.

179 *Mayelane*, *supra* note 150 at para 75.

180 *Ibid* at para 76. See also *CRSA*, *supra* note 123, ss 9–10, 39.

181 *Mayelane*, *supra* note 150 at para 43. See also Helen Kruuse & Julia Sloth-Nielsen, "Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*" (2014) 17:4 PELJ 1710 at 1729.

of Rights" when "developing the common law or customary law,"[182] and although the Court had the opportunity to do so in prior cases.[183] Faced with this constitutional obligation to develop rights-infringing customary laws, the Court held that the protections of dignity and equality in the Bill of Rights made it necessary for a husband to obtain his first wife's permission before entering into a subsequent marriage. If Xitsonga customary law did not require the consent of the first spouse, the Court argued that it should, and applied what the relevant customary law *should* be rather than what it was.[184] This is

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182 *CRSA*, *supra* note 123 at s 39(2).

183 See especially *Bhe*, *supra* note 127, where the majority declined to develop the relevant customary law regarding intestate succession, citing a lack of evidence necessary to do so (at para 109). Instead, the Court elected to declare that the customary law at issue was unconstitutionally incompatible with the Bill of Rights, while modifying the *Intestate Succession Act, 1987* (S Afr), No 81 of 1987 to include polygamous marriages until the legislature enacted a comprehensive succession scheme (at paras 115, 124). Justice Ngcobo, in dissent, would have developed the "Indigenous law so as to bring it in line with the Bill of Rights" (at para 148) as the *CRSA*, *supra* note 123, s 39(2) requires. For other approaches that courts have taken when dealing with potentially unconstitutional customary laws, see Christa Rautenbach, "Case Law as an Authoritative Source of Customary Law: Piecemeal Recording of (Living) Customary Law?" (2019) 22 PELJ 1.

184 Kruuse and Sloth-Nielsen, *supra* note 181 at 1729, point out that the Court equivocates by arguing both that Xitsonga customary law already had this requirement, and that it was necessary to make this development since Xitsonga customary law lacked this requirement. See *Mayelane*, *supra* note 150 at para 87. See also Nhlapo & Himonga, *supra* note 130 at 206, 240–41 for an analysis of the debate surrounding whether this decision applies to all customary marriages, or only those conducted according to Xitsonga custom. On this point, see also Lea Mwambene, "The Essence Vindicated? Courts and Customary

but a hint of the potential issues with South Africa's method of recognition: although customary laws are utilized to judge a case, those laws are subject to being developed at the whim of the courts to attain the "constitutional norm of equality."[185] Indeed, courts are obligated to do so.

### 2. In Accordance with Custom

The second statutory requirement for a valid customary marriage is the rather nebulous condition that "the marriage must be negotiated and entered into or celebrated in accordance with customary law."[186] While this is a highly contextual matter, two primary elements have emerged from the jurisprudence to satisfy this provision: that the groom pay a bride-price—called "lobolo"—to the bride's family; and that the bride's family deliver her to the groom.

"Lobolo" is defined in s. 1(iv) of the *RCMA* as "the property in cash or in kind…which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage."[187] Essentially, it is a bride-price to be paid to the bride's family in return for her delivery. Although lobolo is never explicitly stated in the Act as

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Marriages in South Africa" (2017) 17:1 Afr Hum Rts LJ 35 at 36; *Nhlapo v Mahlangu and Others*, 2015 ZAGPPHC 142 at para 33.

185 *Mayelane*, *supra* note 150 at para 84. Alternatively—as in *Bhe*, *supra* note 127—a court could simply strike down the customary law as being unconstitutional in the same way that any other statutory or common law could be invalidated.

186 *RCMA*, *supra* note 18, s 3(1)(b).

187 *Ibid*, s 1(iv).

being a requirement for the validity of a customary marriage, almost all cultures that practice such unions in South Africa traditionally engage in the practice of lobolo, thus making it an essential component of a wedding celebrated in accordance with customary law under s. 3(1)(b). Indeed, Maithufi and Bekker argue that "it is difficult to imagine a customary marriage without a lobolo agreement. Lobolo is so inextricably bound up with marriage amongst African societies, that its existence is regarded as proof that a customary marriage has been contracted."[188] Kirsty Button, Elena Moore, and Chuma Himonga confirmed this opinion in a survey they conducted in 2016, where thirty-three out of thirty-nine customarily married respondents "perceived that *lobolo* should be negotiated and transferred in customary marriages. These findings indicate normative beliefs about the importance of *lobolo* in customary marriage."[189]

These academic and public opinions have been confirmed by judicial opinion as well. In *M v M*[190] the plaintiff wife sought a decree of divorce and division of property, as the couple had customarily married one another in a community of property.[191] The defendant husband countered that no marriage had ever occurred since, although he had paid R2,000 as lobolo, this was only

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188 Maithufi & Bekker, *supra* note 130 at 187.

189 Kirsty Button, Elena Moore & Chuma Himonga, "South Africa's System of Dispute Resolution Forums: The Role of the Family and the State in Customary Marriage Dissolution" (2016) 42:2 J of S Afr S 299 at 309 [emphasis in original].

190 2009 ZAGPPHC 109.

191 *Ibid* at para 1, 2.

a deposit and he never completed his payment to her family.[192] Justice Ebersohn of the High Court, however, was dubious, as the husband had registered their marriage and the couple had a child together.[193] Ebersohn J. found that a valid marriage had occurred and ordered the divorce and division of property without commenting on whether a deposit of lobolo would have been sufficient to complete the marriage.[194]

This was clarified in *Mkabe v Minister of Home Affairs and Others*.[195] Madala Mkabe claimed that he had married his deceased wife Ntombi Mbungela according to her Tsonga customs, though he himself was Swazi.[196] It had been agreed that he would pay her family R12,000 as lobolo, but in the actual circumstances he only paid R9,000, "a living cow, a suit and [pair] of shoes for the bride's father, a two piece costume for the bride's mother, two boxes of snuff, liquor, and a case of beers."[197] Ntombi's family claimed that he did not pay the full lobolo that was agreed upon, so their marriage was invalid.[198] Justice Twala opined that, regardless of the result that either Swazi or Tsonga customary law would require of the matter, "payment of ilobolo [*sic*] in full cannot be such an essential requirement to invalidate a customary

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192 *Ibid* at para 7.

193 *Ibid* at paras 11, 14.

194 *Ibid* at paras 16, 21.

195 2016 ZAGPPHC 460.

196 *Ibid* at paras 11–12, 21.

197 *Ibid* at para 3.

198 *Ibid* at paras 24, 33.

marriage."[199] If customary law would not allow a reprieve for this lapse, it would have to be judicially developed to allow for this, and the marriage was held to be valid.

After the full or partial payment of lobolo, the bride must be handed over to the husband and integrated into his household. Even if lobolo was fully paid, a failure to conduct this ceremony in accordance with the spouses' customary law would lead to invalidity of the marriage. As Justice Dlodlo held in *Fanti*, "even if payment of *lobolo* is properly alleged and proved that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements."[200] Pieter Bakker also argues that "[t]he integration of the bride is…the final step parties need to take before they are regarded as married in terms of customary law."[201]

In *Rasello v Chali and Others*,[202] the High Court was tasked with determining the validity of Masefako Rasello's marriage to her deceased husband, David Chali. David's family claimed that, while cohabitation had occurred, the two were not married since Masefako had not been handed over in accordance with their Sesotho custom. During a joint family gathering, Masefako's family had suggested marriage as a possibility, but David's family

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199 *Ibid* at para 35.

200 *Fanti*, *supra* note 165 at para 20 [emphasis in original].

201 Pieter Bakker, "Integration of the Bride as a Requirement for a Valid Customary Marriage: *Mkabe v Minister of Home Affairs* [2016] ZAGPPHC 460" (2018) 21 PELJ 1 at 7. See also Siyabonga Sibisi, "Is the Requirement of Integration of the Bride Optional in Customary Marriages?" (2020) 53 De Jure 90 at 103.

202 *Rasello*, *supra* note 168.

scorned the offer and later rejected the suggestion that lobolo had ever been paid.[203] Justice Molemela scathingly rejected Masefako's claim, holding that the delivery of the bride is "an essential requirement for the validity of a customary marriage."[204] Since this had not occurred, the alleged marriage was a nullity.

This same reasoning was applied in *Ntoagae v Makabanyane and Another*[205] where Justice Djaje argued that, since a customary marriage was more about the families than about the spouses, "[t]his therefore entails the involvement of the two families from the inception of the lobola [*sic*] negotiations to the ultimate handing over of the bride."[206] In that case, Phistos Ntoagae applied to the High Court to prohibit the family of Gaehumelwe Tsietso from burying his deceased wife, since this was his sole right as her husband after their Tswana customary marriage.[207] The Court found that no delivery of the bride had occurred and that, despite Phistos's claim that this was "a mere technicality," such delivery "is the most important and final step in the chain of events and happens in the presence of both the bride and the groom's families. One can describe this as the official seal in the African context, of the customary marriage."[208]

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203 *Ibid* at paras 5–7.

204 *Ibid* at para 18.

205 [2015] ZANWHC 78 (HC).

206 *Ibid* at para 15.

207 *Ibid* at para 4.

208 *Ibid* at para 14 [emphasis omitted], quoting *Motsoatsoa*, *supra* note 164 at para 19.

### 3. Registration

Although the *RCMA* requires that spouses register their marriage with the Department of Home Affairs within three months of its solemnization,[209] the Act immediately prevaricates by stating that the "[f]ailure to register a customary marriage does not affect the validity of that marriage."[210] Monica De Souza points out that this legislative ambiguity is intentional, since automatically voiding any unregistered customary marriages would be a severe disadvantage to their primarily rural and disconnected participants.[211] Nevertheless, registration is functionally a requirement as "many civil and private institutions regard registration as the benchmark for validity."[212] This presents the greatest practical flaw in South Africa's method of recognition.

Roxanne Juliane Kovacs, Sibongile Ndashe, and Jennifer Williams conducted a study on the impact and prevalence of registration, finding that 107,137 customary marriages had been registered between the *RCMA*'s implementation and 2008, but that only 10 per cent of those "were registered in the year in which they occurred."[213]

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209 See *RCMA*, *supra* note 18, s 4(1)–(3).

210 *Ibid*, s 4(9). See also *Kambule v The Master of the High Court and Others*, [2007] ZAECHC 2, 2007 (3) SA 403 (HC).

211 See Monica De Souza, "When Non-Registration Becomes Non-Recognition: Examining the Law and Practice of Customary Marriage Registration in South Africa" (2013) 2013:1 Acta Juridica 239 at 243. See also Nhlapo & Himonga, *supra* note 130 at 183.

212 De Souza, *supra* note 211 at 244.

213 Kovacs, Ndashe & Williams, *supra* note 132 at 275.

Their research showed that most spouses only registered when a certificate of registration was necessary, such as after the death of a spouse or when applying for divorce.[214] Even the South African government estimates that "only between 4 and 8 per cent of customary marriages are registered at all."[215]

Unlike civil marriages, where certificates of registration are issued immediately after the ceremony, spouses in a customary marriage must go to an office of the Department of Home Affairs and offer sufficient evidence that a customary marriage has occurred.[216] Besides the burden of travel this places on the spouses—since individuals living according to customary law will often live in isolated areas—the requirement of proof creates the additional problem of having to bring along witnesses, documents, and anything else which may be needed to convince the Department that the marriage has in fact occurred.[217] Moreover, if the registering officer is at all unconvinced that the marriage was properly solemnized, they are obligated to refuse the registration.[218]

De Souza argues that this system is especially punishing for women, who are unable to determine whether their prospective husbands are already married to another woman under customary law,[219] while Higgins,

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214 *Ibid* at 278.

215 *Ibid*.

216 See De Souza, *supra* note 211 at 244.

217 *Ibid* at 252.

218 *Ibid* at 250; see also *RCMA*, *supra* note 18, s 4(6).

219 See De Souza, *supra* note 211 at 246.

Fenrich, and Tanzer confirm this by noting that almost every probate case dealt with by the Master of the High Courts Office involved both a rural, customary wife and an urban, civil wife whose marriage "would trump any previous customary marriage."[220] Husbands in such scenarios would have no motivation to register, since doing so would require them to comply with the expensive and time-consuming contractual necessities of s. 7(6) of the *RCMA*, which, as we saw, require polygamous marriages to have an antenuptial contract regarding their proprietary system.[221] His wives, however, would be at his mercy if a dispute were to arise, and priority for any division of property would essentially go to the first among them to register their marriage.

Even in monogamous marriages, failure to register can lead to dire consequences. De Souza points out that "[e]mployers, pension funds and government departments require people to produce a marriage certificate whenever their marital status comes into question."[222] Although spouses might be legally married according to their own laws, and even according to the requirements of the *RCMA*, lack of a certificate can lead to a complete denial of the public and private rights that are supposed to be attendant upon that marriage. For example, in *Baadjies v Matubela*[223] the applicant sought a decree of divorce, maintenance, and child support, but was denied when she was unable to

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220 Higgins, Fenrich & Tanzer, *supra* note 124 at 1685.

221 See De Souza, *supra* note 211 at 266. See also Mamashela, *supra* note 124 at 637–38.

222 De Souza, *supra* note 211 at 244.

223 2002 (3) SA 427, [2003] 4 TSAR 753 (HC).

produce a certificate, with the Court ruling that the couple were never married. Similarly, in *Road Accident Fund v Mongalo*[224] the Supreme Court of Appeal held that a registration certificate was "conclusive proof" that a marriage had occurred in order to claim survivor benefits after an automobile accident.[225] In short, De Souza is correct when she states: "Statutory validity is thus meaningless and in effect the marriage is unrecognised without registration and a marriage certificate."[226]

## C. CRITIQUE

Whatever well-meaning intentions the drafters of the *RCMA* may have had, De Souza is far from the only critic to claim that the Act has essentially rendered Indigenous-law marriages in South Africa meaningless by forcing strict compliance with a statutory system. Maithufi and Bekker, for example, boldly assert:

> [T]he Act in effect abolishes customary marriages. These marriages stand on three legs: lobolo, polygamy, and the communal nature of African family life. By imposing the common law consequences of marriage upon customary marriages, the entire fabric of the communal ([and] extended) family system is destroyed. One may ask why a

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224 [2002] ZASCA 158, [2003] 1 All SA 72 (SCA).

225 *Ibid* at para 12. See also *Ndlovu v Mokoena and Others*, [2009] ZAGPPHC 29, 2009 (5) SA 400 (HC), where a registration was cancelled after the Court concluded that there was insufficient evidence of the marriage and that the registering officer had acted incorrectly.

226 De Souza, *supra* note 211 at 246.

> couple should marry by customary law at all if in the end the consequences are no different from those of a common law marriage.[227]

Why indeed, since the South African system of recognition—referred to by this author as "Codification"[228]—has made the living, evolving customary laws of South Africa's Indigenous peoples the property of the state. Consequently, the state's courts are constitutionally required to invalidate[229] or develop[230] these laws whenever they conflict with European, individualistic conceptions of human rights, often without engaging in a meaningful analysis of how concepts like "dignity" and "equality" are perceived and manifested in group-centered Indigenous communities,[231] and often without "making a genuine attempt to understand and honour the African philosophy behind the practice in

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227 Maithufi & Bekker, *supra* note 130 at 197 [emphasis omitted]. See also Osman, "Statutory Regulation", *supra* note 154 at 9: "The result [of the *RCMA*'s interpretation], however, is an eradication of customary law principles as highly sanitised versions of customary law are created and protected."

228 The term is used by Zlotkin in "From Time Immemorial", *supra* note 75 at 364, though the term is a particularly old and debated one regarding Indigenous law's recognition, especially since many Indigenous groups themselves have codified their laws. See e.g. Canada, Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006) at 13–15, online (pdf): <caid.ca/IndLegalTrad2006.pdf>.

229 As occurred in *Bhe*, *supra* note 127.

230 As occurred in *Mayelane*, *supra* note 150.

231 See Lewis, *supra* note 178 at 1139–40.

question" to determine if these rights are already being preserved by Indigenous mechanisms.[232]

Thus, the first fundamental problem with this method of recognition that must be addressed is the issue of the "code" itself. As Zlotkin warns, any codification of customary laws encourages judges "to focus on the words of the code rather than on evidence of the custom in question, including evidence of its adaptability."[233] We have seen this at play in South Africa's jurisprudence when, for example, the High Court held a marriage to be invalid because of a failure to comply with the statutory contractual requirements when entering into a polygamous marriage,[234] regardless of what the parties' particular Indigenous law may have required. As Lea Mwambene and Helen Kruuse point out, "the failure of the parties to comply with a 'strict, black letter definitional analysis' of the relationship has resulted in a finding that a valid marriage does not exist, and—as a result—no rights or obligations exist."[235] Once a custom is codified, failure to follow the code, even when it does not properly reflect the custom, is a failure to follow the law.

This leads into the second fundamental problem with the Codification method, namely that, once codified,

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232 Nhlapo, *supra* note 144 at 23.

233 Zlotkin, "From Time Immemorial", *supra* note 75 at 365.

234 See *MM*, *supra* note 177 at para 24.

235 Lea Mwambene & Helen Kruuse, "Form over Function: The Practical Application of the Recognition of Customary Marriages Act 1998 in South Africa" (2013) 2013:1 Acta Juridica 292 at 310.

customary law becomes the property of the state.[236] On the one hand, this takes the customary law out of the hands of its Indigenous participants, depriving them of the ability to modify and evolve the law to fit their changing, modernizing needs, and stripping tribal elders of their former roles as mediators and arbitrators. Instead, the law becomes frozen at the point of codification, or possibly at the point of judicial interpretation and precedent-setting, causing that law to lose its ability to self-adapt to the changing social needs of its adherents.[237] On the other hand, that same customary law then becomes subject to development by those outside the Indigenous community—that is, by the judiciary. As we saw, South African courts are obligated to develop Indigenous laws to fit the requirements of the *CRSA*, which can result in the generation of new rules of consent or lobolo-payment that are entirely foreign to the people group's laws. In turn, this creates a customary law that is not only robbed of its distinctive features, but one which will inevitably become increasingly indistinguishable from the common law until

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[236] This criticism, of course, assumes that it is the settler state which is conducting the codification, and does not necessarily apply to codification that might be conducted by Indigenous law-making bodies themselves. See Canada, *supra* note 228 at 14.

[237] See Sheleff, *supra* note 19 at 378. See also Osman, "Statutory Regulation", *supra* note 154 at 9. It could be argued, however, that the courts' constitutional obligation to develop customary law allows them to free *living* customary law from potential stagnation caused by forced adherence to statutory or *official* customary law. Judicial development could recognize new changes in customary practices with which prior cases could not engage. Yet, whether the courts are achieving this potentially more beneficial form of development is debatable. See Nhlapo, *supra* note 144 for a discussion of this very debate.

it is useless as an independent system, even to the people whose law it originally was.[238]

Finally, by forcing compliance with a statutory scheme, Codification places immense practical hardships on those for whom customary law is the only law available, namely those living in remote, disconnected, and poor communities. Spouses entering a customary marriage are often entirely unaware of the statutory consequences of their union and only discover these when they are at their most vulnerable: after the death of their spouse or during a divorce. Maithufi claims that with the default community of property regime, for example, "some people find themselves, even before they commence to live together as husband and wife…locked in a marriage whose consequences they did not intend or contemplate."[239] The quasi-mandatory registration system in particular has resulted in otherwise valid marriages being discarded by the state, or in wives of polygamous marriages being deprived of their customary *and* statutory rights, simply

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238 Indeed, it could be argued that in *Bhe*, *supra* note 127, the majority's decision suggests that a court can simply choose between the two equipotent systems of customary or statutory law. See Lewis, *supra* note 178 at 1130, who describes the Court as simply opting "for the relatively straightforward solution of choosing one set of norms over another, without attempting to resolve any fundamental conflict between them" instead of actively confronting "a situation of normative plurality." Such an appearance of mere choice between systems will only become more common as customary law loses its independent identity.

239 Maithufi, *supra* note 149 at 268. See also Manthwa, *supra* note 156 at 444.

because the registry is complicated, geographically distant, and foreign to their culture.

The outcome of this codified quagmire is that customary marriages are now, and will increasingly become, identical to civil marriages. Nicola Barker argues that the changes to customary marriage introduced by the *RCMA* and its jurisprudence "align it with civil marriage to the extent that all of the 'elaborate consequences' of civil marriages have been made applicable to customary marriages."[240] She claims that codification has essentially abolished customary marriage in South Africa,[241] a claim with which De Souza agrees. "[I]nstead of elevating customary law marriages to a status that is equal to that of civil law marriages, in effect customary marriages are still relegated to the shadows of non-recognition."[242]

## IV. A PROPOSAL – SIDE-BY-SIDE EXISTENCE

### A. THE MEANING OF MARRIAGE

After examining the methods of Indigenous-law marriage recognition in Canada and South Africa, it might be helpful to remind ourselves of the fundamental issue, namely, whether misrecognition even matters. If Indigenous-law marriages are recognized as valid in one way or another, what difference does it make if they are not recognized in

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240 Nicola Barker, "Ambiguous Symbolisms: Recognising Customary Marriage and Same-Sex Marriage in South Africa" (2011) 7:4 Int J L in Context 447 at 450 [emphasis omitted].

241 *Ibid*.

242 De Souza, *supra* note 211 at 271.

the *right* way? Phrased in the most forthright way possible: Who cares?

First, a practical answer. For most individuals who practice Indigenous-law marriages, both in Canada and in South Africa, there is simply no other option available to them. The choice between a civil marriage and an Indigenous-law marriage is not a real choice, but a Hobson's choice of adhering to Indigenous law or not getting married at all. These peoples are often isolated from the dominant culture, living in remote communities with little or no access to the legal system of the state and its officials, whether for the solemnization of their marriage or for any other family law purposes. As Zlotkin puts it, such people do not "make arbitrary choices between two systems of law; they had practical or philosophical reasons for this action. In many instances there was no choice to be made; a person who wanted to marry…had to follow customary law."[243]

When spouses have no alternative but to marry one another according to their custom—due to limitations of isolation, finances, or unfamiliarity with the colonial legal system, not to mention cultural and familial pressures—but are then denied the validity of their marriage or forced to overcome enormous evidentiary hurdles simply to establish its existence, this is a fundamental injustice. When this kind of political violence is committed against sovereign peoples who have inhabited these countries and have lived according to their own family laws since time

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[243] Zlotkin, "Judicial Recognition", *supra* note 36. See also Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (London: Routledge, 2014) at 73.

immemorial, it is unacceptable in our allegedly modern and enlightened century. "Far from being 'merely' symbolic," this form of misrecognition leads directly to maldistribution of social resources that are otherwise afforded to civil-married spouses, and to participatory imparity in the rights and privileges that spouses in the dominant culture take for granted.[244]

Second, it is vital to note that misrecognition is a fundamental injustice whether accompanied by such distributive and participatory inequality or not.[245] Marriage is "one of the most significant forms of personal relationships,"[246] so to position one culture's form of marriage as superior to another, by the ways in which each is allowed to function in the legal system of a society, is to posit that one type of marriage is more "significant" than the other. Whatever form misrecognition takes, its essence is an institutionalized perception that one form of marriage is less worthy of respect than another. The misrecognition of Indigenous-law marriages, in Canada especially, suggests to the dominant society that they are not marriages at all,[247] but instead are "nothing more than the type of common law relationship one frequently sees in the non-Native community."[248]

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244 See Fraser, *supra* note 20 at 281–82.

245 *Ibid* at 281.

246 *Halpern*, *supra* note 23 at para 5.

247 See James Crawford, Peter Hennessy & Mary Fisher, "Aboriginal Customary Laws: Proposals for Recognition" in Morse & Woodman, *supra* note 27, 27 at 45.

248 *Manychief*, *supra* note 13 at para 77.

But marriages are not common law relationships. They are fundamentally different. To be sure, the state is able to grant the same kind of legal rights and protections that spouses enjoy to couples living in non-marital relationships. Likewise, in many Canadian provinces, the parties to a non-marital "spousal relationship" are entitled to the same proprietary and maintenance rights as a married couple.[249] Yet, the state is not able to grant a "spousal relationship" the kind of spiritual, theological, or cosmological significance that a particular culture places within marriage. Marriage is not inherently a claim to a set of public welfare benefits from the state, nor a claim to the privilege of non-compellability in court, nor a claim to an equal division of property upon divorce. The essential core of marriage is a public declaration by the spouses to take part in a culturally dictated set of obligations toward one another, their families, and their communities, obligations which may or may not—but usually do—have powerful spiritual and ethical implications. When it comes to the recognition of marriage, the state's role is simply to allow individuals to make these obligations without interfering, and without favouring one set of obligations over another.[250]

## B. SIDE-BY-SIDE EXISTENCE

Indigenous-law marriages are not something to be avoided or merely tolerated by the legal system. Canada must acknowledge that it does not bear a monopoly on their

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249 See e.g. *The Family Property Act*, SS 1997, c F-6.3, s 20. See also *ibid*, s 2(1), "spouse".

250 See Gregg Strauss, "The Positive Right to Marry" (2016) 102:7 Va L Rev 1691 at 1694, 1765.

recognition, and that the state alone does not have the exclusive power to validate or invalidate, commence, or terminate, certain types of interpersonal relationships.[251] As Brendan Tobin states,

> Customary law has been around a long time and it is fair to say it is going to be around for a long time to come. The sooner the legal profession, legislators and the wider populace come to terms with that fact and embrace the rich legal diversity of Indigenous peoples the sooner that diversity can help enrich our national and international legal systems.[252]

But the question remains how this might be done, and how to avoid yet another form of misrecognition. Is it possible to allow Indigenous-law marriages to flourish in a genuinely validated capacity within the Canadian legal world?

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[251] See Morse & Woodman, *supra* note 116 at 16. Some of the discussion that follows could usefully, though only partially, be analogized to the more prevalent recognition of Indigenous family law in the realm of customary adoptions. For a helpful introduction to this similar, yet separate, issue, see Celeste Cuthbertson, "Statutory Recognition of Indigenous Custom Adoption: Its Role in Strengthening Self-Governance over Child Welfare" (2019) 28 Dal J Leg Stud 29. See also Cindy L Baldassi, "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts, and Convergences" (2006) 39:1 UBC L Rev 63. For legislative recognition of customary adoptions, see the *Aboriginal Custom Adoption Recognition Act*, SNWT 1994, c 26; and its application in Nunavut through the *Nunavut Act*, SC 1993, c 28, s 29.

[252] Tobin, *supra* note 243 at 208.

At the outset, a necessary first step is for the state to accept that it lacks a jurisdictional monopoly over this limited area of law: Indigenous-law marriages can exist side-by-side the independent functioning of civil marriages. While this is an admittedly narrow scope for a recognition of Indigenous legal systems, a comprehensive proposal for the acknowledgment of Indigenous law *in toto* is decidedly beyond the scope or purposes of this essay and is better left to wiser scholars. Nevertheless, acceptance must be done as a first step, and importantly must be done in the correct way. Acknowledgment that takes the form of a state sanction of Indigenous-law marriages retains the falsehood that their validity exists at the mercy and whim of the Crown. Further, acknowledgment by incorporation into the state's statutory system of laws is simply a usurpation of power. Rather, proper acknowledgment must, at the least, take the form proposed by Walters: the state must recognize that an Indigenous community's validation of its own marriages is "one of many bodies of law that can be shown to fit together in a manner that best reflects the equal moral imperative for normative order."[253] An Indigenous nation's law, which holds that their own practices constitute a valid marriage, must be acknowledged as having independent legal force without the need to be endorsed by the state.

A second necessary step is that Canada must acknowledge that Indigenous nations have the capacity to form and empower internal institutions to govern the

253 Walters, *supra* note 36 at 376.

validation and dispute-resolution of their own marriages.[254] In doing so, it is crucial to note—outside the terms of those few self-governance agreements that have been entered into between some nations, Canada, and the relevant provincial or territorial government—that Indigenous nations are not simply *allowed* to form these bodies, as this would again merely perpetuate the view that this power is being delegated by the Crown. While such a conferral of authority is "to be expected when the state claims a monopoly of legal authority," as Morse and Woodman phrase it, a belief that this authority is conferred by the state would logically and practically lead to the conclusion that it can be abridged, withdrawn, or terminated.[255] Instead, Canada must accept the independent juridical bodies of Indigenous nations, formed and empowered by that nation's own laws rather than by any state legislative enablement,[256] and recognize their ability to structure, solemnize, and validate their own marriages.

Of course, what form this juridical body takes will necessarily depend upon the laws and matrimonial practices of each specific nation. Moreover, this body may not necessarily be the same institution as that which the

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254 Amendments made in 2020 to Ontario's *Marriage Act*, RSO 1990, c M.3 allow those who are recognized by a First Nation or other Indigenous entity as entitled to solemnize marriages to be registered with the Minister, and to solemnize marriages according to that group's rituals (ss 20.2–20.4). However, this is not the type of acknowledgment that this author is recommending here, as these provisions merely prescribe the creation of *civil marriages* by Indigenous celebrants and rites, not the creation of distinct *Indigenous-law marriages* in a holistic sense.

255 Morse & Woodman, *supra* note 116 at 18.

256 *Ibid* at 17.

community accords other juridical powers. Among the Iroquois nations, for example, the clan mothers we discussed previously may be empowered by the community to govern the requirements for marital validity. Others may choose tribal elders to fulfill this role, such as the unnamed elder of the Blood Indian Reserve who told Delia Manychief that cohabitation with parental consent was sufficient for a marriage.[257] Other communities may simply leave it to the parents of the couple, or to the extended family.

In most cases, but not necessarily all, this same juridical body would also be the institution empowered by the nation to engage in dispute resolution between the couple. Since their marriage is inherently a set of obligations toward one another dictated by the distinctive culture of that community, it only makes sense that the officials within that same community should have the authority to determine if a breach of those obligations has occurred, and what the culturally appropriate solution should be. In many of these communities, law takes the form of stories and processes rather than fixed rules; disputes within marriages formed by these laws should be solved by those who know the laws in their original form, who understand the language of the stories in which they are contained, who can "interpret their symbolism and imagery,"[258] and who can correctly apply them to the appropriate circumstances. This would at least begin to avoid the problem of conflating civil marriages and Indigenous-law marriages when they are forced to use the

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257 *Manychief*, *supra* note 13 at paras 7-8.

258 Tobin, *supra* note 243 at 80. See also Canada, *supra* note 228 at 13–15.

same mechanisms to resolve disputes. An independent forum of dispute resolution would allow for culturally appropriate processes to interpret the solutions for culturally dictated matrimonial obligations.

However, it is vital to be cognizant that centuries of colonial practices have, in many communities and in many ways, corrupted the traditional forms of Indigenous juridical and governmental bodies away from their traditional forms.[259] This is yet another reason why consultation with the communities is necessary when empowering Indigenous self-governance institutions in any sphere, not simply in marital solemnization and dispute resolution. Ceding new or more powers to entities which, in that cultural context, would have traditionally lacked jurisdiction over family law matters—not to mention entities that were originally established to carry out assimilationist policies—would only facilitate maintaining the *status quo*; or worse, facilitate further assimilation and loss of the community's distinctive marital beliefs and practices.

Third, a procedure must be established for regulating the interactions between the marital institutions of Indigenous nations and the Canadian state. At least one scholar has suggested that Indigenous laws and colonial laws are "incommensurable," in the sense that they inhabit such distinct normative and ideological worlds that they

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[259] For an introduction to this issue in Canada, see John L Tobias, "Protection, Civilization, Assimilation: An Outline of Canada's Indian Policy" in Ian AL Getty & Antoine S Lussier, eds, *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: UBC Press, 1983) 39; and for an analysis of the situation in South Africa, see Nhlapo & Himonga, *supra* note 130 at 374ff.

cannot properly be compared, let alone function with one another.[260] This view suggests that Indigenous legal systems and colonial legal systems cannot interact without "exert[ing] violence in the lives of Indigenous peoples."[261] Even if true, this position is remarkably unhelpful for the real world, outside the realm of ideas. Indeed, Tobin suggests that "[t]he notion of legal pluralism as a separation of legal worlds, in which Indigenous peoples' rights to their legal regimes is limited to their own internal affairs and has no bearing on third parties, is not in tune with the needs and reality of today's multicultural legal melange."[262]

In the world as it is, rather than the world as it should be, interactions between even the narrow jurisdiction of marital validation and the wider legal system will be necessary and frequent. The question remains about how to best to regulate this to avoid exerting social, economic, cultural, or spiritual violence against Indigenous peoples.[263] Zlotkin suggests that once "a separate pre-

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260 Manley-Casimir, *supra* note 117 at 158.

261 *Ibid* at 156.

262 Tobin *supra* note 243 at 193–94.

263 Indeed, the recently passed *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 obligates the Canadian government to bring its laws into compliance with the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/Res/61/295 (2007) 1. This necessarily entails an avoidance of such exertions of violence, not to mention likely requiring much of the self-governing recommendations this essay describes—though its actual effects are yet to be seen. See also the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 for a provincial equivalent to the federal statute.

existing system of [Indigenous] laws" has been acknowledged, legislation by the state can recognize an Indigenous legal system's "applicability in the resolution of disputes set outside aboriginal communities."[264] In an earlier work, he pointed out that the "established judicial system" will inevitably become "involved in appeals from aboriginal legal systems,"[265] making the depth and breadth of any such legislation all the more important.

Necessarily, Indigenous nations would need to be involved in the drafting of such legislation. Its scope would also have to be narrowly focused on allowing for appeal in circumstances where, as Tobin argues, certain universal human rights have been breached,[266] and on supporting the expert opinions of the Indigenous juridical body discussed above. For example, Brian Bix suggests that such legislation could set specific boundaries, "namely minimum terms that will ensure that vulnerable parties (including third parties to marriage arrangements, in particular children) are not badly harmed."[267] In a word,

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264 Zlotkin, "From Time Immemorial", *supra* note 75 at 364.

265 Zlotkin, "Judicial Recognition", *supra* note 36 at 11.

266 Tobin, *supra* note 243 at 181, 210.

267 Brian H Bix, "Pluralism and Decentralization in Marriage Regulations" in Joel E Nichols, ed, *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriages and the Boundaries of Civil Law and Religion* (Cambridge: Cambridge University Press, 2011) 60 at 71. However, see Nhlapo, *supra* note 144 at 21–23 for a discussion on the importance of pursuing human rights *outcomes* rather than human rights *methods*. The former pursuit, Nhlapo argues, facilitates embracing culturally distinctive values that nevertheless achieve contextually relevant human rights norms, while the latter risks imposing foreign frameworks that may conflict with Indigenous

Side-By-Side Existence is not exclusive existence—nor can it be in an increasingly multicultural, legally pluralized world.

## V. CONCLUSION

For at least eight thousand years, the marital laws and structures of the Kwakwaka'wakw people have functioned. This is not to say that such practices were without their problems, or that they were static and unchanged for an eon. Like marriage in all cultures, these customs no doubt adapted to fit the evolving needs of the people, to meet new circumstances, to correct old mistakes, and to create better futures for their children. But for generations, these laws operated and flourished, developing and incorporating an intricate cosmology that placed the family at its core, while forming a fundamental element that has been key to the survival of a people and a culture since time immemorial.

Indigenous people do not need their marriages to be validated by the state for them to work. They know they work. They do not need the state to recognize that their marriages have value. They know they have value. Yet the *mis*recognition of marriage—the failure of the state or the broader population to perceive and empower marriage in the form that a particular culture has moulded it over thousands of years—does devalue marriage and does work genuine harm. Indigenous-law marriages will continue to

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worldviews such that the desired end is not actually achieved for that community. In creating and enforcing such rights-protecting minimum terms, one must strive to understand the Indigenous philosophy behind a specific practice, and perceive how multiple normative orders may achieve the same outcome through different—and even ostensibly conflicting—methods.

occur and to serve the social and spiritual needs of their spouses. Canada's role is simply to recognize these in the way that will best achieve justice for their participants.